

BRIEF IN SUPPORT OF PETITION

O P I N I O N S

The trial court in Case No. 1181 dismissed that action for want of jurisdiction upon the 22nd day of November, 1943 (R. 45). The opinion of the Circuit Court of Appeals was filed October 25, 1944 (R. 49-53) and has not yet been officially reported. Mandate was stayed in the Circuit Court for thirty days (R. 54) by order made on November 27, 1944.

J U R I S D I C T I O N

Plaintiff seeks review, by certiorari, of the judgment of the United States Circuit Court of Appeals for the Tenth Circuit, of October 25, 1944, under provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 [USCA, 347(a)].

STATEMENT OF THE CASE

The jurisdiction of the federal court in the parent case No. 461, is unquestioned by reason of diversity of citizenship, and the amount in value exceeded \$3,000.00.

The dismissal of the receiver in the parent case was held to effect a release of the subject-matter and thereby a termination of the court's jurisdiction in the ancillary action brought under the court's direction in the same court, by reason of lack of diversity of citizenship in the latter action. The trial court in the parent action, No. 461, sought to enforce its relief vitalizing its judgment therein by the present ancillary action, and at no time has released jurisdiction or discharged the purposes of its decrees and orders in either case, as reflected by the following quotations from the orders and decrees in the parent case.

From the original decree:

"It appearing from the evidence in this cause, and the findings of fact and conclusions of law of the Court based thereon, there are certain instances where persons who are not parties to this action may be liable for the improper administration of the affairs of the Farmers Mutual Royalty Syndicate, Inc., and Oils, Inc., and who are not bound by the findings herein. The Court, therefore, suggests to the Receiver that an investigation be made of such facts and where justified that application be made to this Court for permission to institute suit for proper relief" (R. 38).

It also ordered

“* * * that the Court retain jurisdiction of this cause for the purpose of enforcing this decree and the administration of the property by the receiver of the Farmers Mutual * * * and * * * Oils * * *; and for such accounting as will be necessary between the parties hereto, * * *” (R. 40).

From the Findings and Order Transferring Operations to the Board of Directors,

“* * * the court finds that the change should be made subject to this Court retaining jurisdiction for the purpose of carrying out and enforcing all orders, judgments and decrees heretofore made and entered herein, * * *”

and orders that,

“* * * this Court retains jurisdiction in the above styled cause, and ancillary proceedings thereto for the purpose of enforcing and carrying into effect the orders, judgments and decrees of this Court heretofore issued and filed herein, * * *”

and further orders,

“* * * that the respective boards of directors of Farmers Mutual Royalty Syndicate, Inc., and Oils, Inc., shall make semi-annual reports to this Court of their acts in accordance herewith, and with the previous orders and judgments herein” (R. 44-45).

All other important features of the controversy are contained in the statement of the foregoing petition, and are adopted here.

SPECIFICATIONS OF ERROR

(1) The Circuit Court of Appeals erred in holding that the dismissal of the receiver, appointed over solvent corporations, terminated the jurisdiction of the equity court where that court specifically retained jurisdiction of the ancillary actions, and continued to enforce its decrees controlling the subject-matter in the parent case, through a board of directors held answerable and subject to the directions of the equity court in the parent action.

(2) The Circuit Court of Appeals erred in holding that the physical possession of corporate properties by a receiver was essential to the equity court retaining jurisdiction in the principal case and ancillary action to it, where the equity court uses other means within its power to enforce its decrees.

(3) The Circuit Court of Appeals erred in adopting the position that property taken possession of by the court's receiver constituted the entire *res* and subject-matter of the parent case.

SUMMARY OF ARGUMENT

Point I.

A new bill filed by order of the court in an equity case, continuing the subject-matter of the parent action to recover the *res* involved in the original case, joining new parties defendant, and over which latter bill the court retains jurisdiction, is an ancillary action, deriving its jurisdictional features from the parent case, and diversity of citizenship is not required.

Point II.

Ancillary jurisdiction extends to the subject-matter irrespective of the physical possession of the *res*.

Point III.

The opinion of the Circuit Court is contrary to the decisions of the United States Supreme Court.

ARGUMENT

Point I.

A new bill filed by order of the court in an equity case, continuing the subject-matter of the parent action to recover the *res* involved in the original case, joining new parties defendant, and over which latter bill the court retains jurisdiction, is an ancillary action, deriving its jurisdictional features from the parent case, and diversity of citizenship is not required.

The decision of the Circuit Court of Appeals determined the question of jurisdiction in the ancillary action No. 1181, upon the effect of transferring the proceedings from the receiver to the corporate board of directors (R. 53).

According to the Circuit Court this transfer removed from the court in the parent case the custody "and control of the properties and assets in the main proceedings," and that the effect of the transfer was to terminate the court's jurisdiction of the subject-matter in the parent case, thereby depriving the ancillary case of its parent, with the resultant loss of jurisdiction for lack of diversity.

The Circuit Court of Appeals, in so holding, adopted the position that the physical possession of the property and its control by the court, through its receiver, was the determining factor of jurisdiction.

It is the position of the appellant here that the jurisdiction of the federal court in ancillary matters is not deter-

mined upon the control of a part of the property, but of all of the *res* of the subject-matter of the parent case.

It is the subject-matter of the parent case in all of its ramifications that the court of equity has jurisdiction over. And it is the control of the subject-matter in the parent case that sustains the jurisdiction of a court of equity in all ancillary proceedings.*

In order to properly determine whether Case 1181 was a continuation of the equity process of the court in 461, it is necessary to ascertain what the subject-matter and *res* of the parent case was, and then to determine whether the ancillary action involves that *res* or subject-matter.

The petition in the original case sets out as the non-resident plaintiffs, the stockholders of the Farmers Mutual. The defendants were the parent company, the Farmers Mutual, its subsidiary corporation, Oils, and their officers. The relief prayed for by these stockholders, for themselves and their class, was in substance to recover their properties wrongfully taken by the corporate officers, and to re-establish in the nominally named corporate defendants, Farmers Mutual and Oils, that property, along with the changing of the boards of directors from dishonest to honest men (R. 20-29).

***Freeman v. Howe** (1860), 65 U. S. 450 (24 How.), 16 L. Ed. 749; **Hume v. City of New York** (1918 C. C. A. 2), 255 Fed. 488, certiorari denied, 249 U. S. 603, 63 L. Ed. 797; **Central Union Trust Company of New York v. Anderson County, Texas et al.**, 268 U. S. 93, 69 L. Ed. 862 (So. Dist. Texas); **White v. Ewing**, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; **State of Oklahoma v. State of Texas**, 258 U. S. 574, 66 L. Ed. 771, 52 Sup. Ct. 406 (1922).

The *res* in Case 461 thereby consisted of all properties then in the possession of the Farmers Mutual and Oils, coupled with all properties that under equity, should be in the possession of those corporations. The *res*, therefore, was both that property over which trial court Judge Broaddus took immediate possession through his receiver, and that property that should have been in the possession of those corporations, for the benefit of the stockholders, and which was held by those not parties to the principal action, but who were made parties, by the trial court in exercising its equity ancillary jurisdiction in Case No. 1181.

A reading of the petition in 461, with the decree of the court therein, with particular attention to part three thereof, establishes the properties, and frauds affecting them, over which the equity court was exercising jurisdiction (R. 20-29, 30-40).

Within the arms of its processes in the parent case, the equity court did not have jurisdiction of those additional parties, both corporate and individual, they not having been sued at the commencement of the original case. These persons and their present controlled corporations, now joined in the ancillary action, are those persons referred to by Trial Judge Broaddus, in the parent case, under part three of his decree (R. 38). The properties and frauds involved in 1181 are those same properties and frauds involved in Case 461, and specifically referred to by the trial judge in his decree.

A reading of the petition in 1181 demonstrates the parallel issues of the ancillary action to the issues in the parent action (R. 2-14).

The ancillary action is a continuation of the arm of the equity court to enforce the relief sought by the stockholders in the parent action and granted by the judge in that case.

This ancillary action could just as well have been a supplemental bill filed in the parent action. It could have been joined in the parent action by the court stopping the proceedings during the trial in the parent case and requiring the joining and serving of the additional parties involved in the ancillary bill. This the trial court did not see fit to do. The long and tedious trial affecting the thousands of properties and hundreds of transactions of the fraudulent acting corporate officers was not inviting to a recess in the proceedings in the parent case.

It was far more feasible to use the processes that Judge Broadus used in ordering the bringing of this ancillary bill.

Let the Court not forget that the corporate defendants were not insolvent. The receiver performed his services and then, for the sake of economy to the corporations, with resultant benefit to the stockholders, the equity court altered its method of pursuing the *res*, and by its orders substituted the boards of directors over which the court retained its control (R. 44-45).

As stated in the case of *Alexander v. Hillman*, 296 U. S. 222, 80 L. Ed. 192, 56 Sup. Ct. 204, referring to the equity courts:

"Their established forms being flexible, courts of equity may adapt proceedings, and remedies to the circumstances of cases and may formulate them to safeguard, adjudge and enforce the rights of all parties."

The subject-matter of the ancillary action is no new wrong and involves no additional properties to that which were involved in the parent case, and which would have been disposed of therein had the defendants in the present action been sued in the parent case.

The effect of the Circuit Court of Appeals opinion was to chop off the arm of the equity court in pursuing the property and the subject-matter of the original case. This was held to be effected by the discharge of the receiver, even though the trial court specifically retained jurisdiction of the ancillary action and retained control of all of those matters included in the court's original decree and its subsequent orders.

It was not the appointment of the receiver in the parent case, or the retaining of the receiver with his powers, that gave the trial court its jurisdiction in that action. It was the subject-matter and the *res* involved in that parent action, over which the court had jurisdiction.

Oils was a defendant in that case. The petitioners were non-residents and the ancillary action, derived its

jurisdictional elements from the parent case. The jurisdiction in the ancillary action exists, with or without a receiver, so long as the court is in the process of enforcing its decrees and securing the property or rights over which it had assumed jurisdiction.

It was a continuation of the subject-matter of the original action and, as stated in *Alexander v. Hillman*, *supra*:

"Nothing is more clearly a part of the subject-matter of the main suit than the recovery of all that to the *res* belongs."

And, as in the *Alexander v. Hillman* case, the judge here in the parent action is pursuing, in the ancillary case, the *res* that is the subject-matter of the parent action.

The effect of the Circuit Court of Appeals opinion is to separate the case of Oils, and that of Farmers Mutual, the latter being a non-resident and entitled to federal jurisdiction, even though the controversies involving the defendants in the ancillary action concern both corporations jointly.

The decree, in effect, stops Judge Broadbuss in the completion of the avowed purposes of his decrees to re-establish in the corporate entities their properties to be held by them for the benefit of their stockholders.

The effect of the decree is to force the continuation of the receivership, unnecessary and expensive, only for the purpose of retaining jurisdiction.

This we submit is not required by a court of equity to accomplish and effectuate its decrees. Physical possession of property in itself is not prerequisite to the equity court's jurisdiction.*

Point II.

Ancillary Jurisdiction extends to the subject-matter irrespective of possession of the physical property.

The physical possession of the property is not the determining point of the court's jurisdiction in an ancillary action. So long as the *res* involved in the principal case is the subject-matter of the ancillary bill, the court of equity has ancillary jurisdiction.

This is true even though the possession of the property itself is no longer in the court. If the subject-matter of the ancillary bill, even though involving strangers to the principal suit, has relation to that property over which the court has exercised jurisdiction or seeks to exercise jurisdiction, diversity of citizenship is not required. *Central Union Trust Company of New York v. Anderson County Texas et al.*, 258 U. S. 93, 69 L. Ed. 862 (So. Dist. Texas).

**Dugas v. American Surety Co.* (1937), 300 U. S. 414, 421, 57 Sup. Ct. 515, 81 L. Ed. 720; *Pell et al. v. McCabe et al.*, 256 Fed. 512 (C. C. A. 2, 1919, N. Y.), 168 C. C. A. 18, 254 Fed. 356, 250 U. S. 573, 63 L. Ed. 1147; *Cincinnati, Indianapolis & Western Ry. Co. v. Indianapolis Union Railway Co.*, 70 L. Ed. 490, 270 U. S. 107 (1926 Ohio).

To permit the decision of the Circuit Court to stand is depriving the equity arm of the federal district court of its power to recover the property which is the *res* and subject-matter of the case over which it has jurisdiction. It deprives the court of its power to enforce its decrees.

Point III.

The decision of the Circuit Court is contrary to the decisions of the United States Supreme Court.

The decision of the Circuit Court of Appeals is contrary to the cases decided by the United States Supreme Court and cited herein.

Respectfully submitted,

HAL WHITTEN,
1030 Hightower Building,
Oklahoma City, Oklahoma,
Attorney for Petitioner, Oils, Inc.

WHITTEN & WHITTEN,
Of Counsel.

December, 1944.